Cheah Swee Huat & Anor (respectively sued as Chairman and Secretary to Seh Tek Tong, Cheah Kongsi, a registered society) v Hun Meng Development Sdn Bhd

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO P-02–1917–11 OF 2014

MOHD ZAWAWI SALLEH, VARGHESE GEORGE AND BADARIAH SAHAMID JJCA

26 AUGUST 2016

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Contract — Building contract — Breach — Respondent entered into agreement to develop land with registered society represented by appellants — Land owned by society — Approval for subdivision granted — Society refused to surrender document of title to land authority — Whether agreement valid and enforceable — Whether society breached agreement — Whether learned trial judge correct on assessment and award of damages

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Land Law — Housing developers — Documents of title — Society refused to surrender document of title to land authority for development of land — Whether society required to hand over land to land authority

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The appellants in this case were the trustees and principal office bearers of a registered society known as Cheah Kongsi whereas the respondent was a property developer company. The respondent and Cheah Kongsi had entered into an agreement ('the agreement') to develop lands owned by Cheah Kongsi known as Lots 429 and 430 together with five adjoining pieces of land belonging to other parties ('the development project'). On 31 October 2005, the High Court via an application made by Cheah Kongsi had approved and sanctioned the agreement. The development project was to be undertaken in two phases, whereby the first phase would involve Lot 429 and two other lots whereas the second phase would involve Lot 430 and three other lots owned by the other owners. Dispute arose when Cheah Kongsi refused to surrender the documents of title to Lot 429 to the respondent or the land authority for excising the widened road reserve for the back lane upon approval of the plans for subdivision by the land authority. Subsequently, the respondent sued the appellants for breach of contract and claimed for damages to be paid by Cheah Kongsi. The trial judge allowed the respondent's claim, however His Lordship decided to mitigate the respondent's claims for damages and only allowed 25% of the respondent's claim for the first phase and 14% of the respondent's claim for the second phase. Dissatisfied with the decision, the appellants appealed against the said decision whereas the respondent cross-appealed against the award of damages given by the trial judge. The broad issues for court's

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deliberation were: (a) on the findings of the learned trial judge as to the validity and enforceability of the agreement; (b) on His Lordship's findings that there had been a breach of contract committed by Cheah Kongsi's failure to hand over the title deed of Lot 429 when required; and (c) on the assessment and award of damages made by the learned trial judge.

Held, allowing the appellants' appeal in part and dismissing the respondent's cross-appeal:

(1) There was sufficient evidence of related discussion and due approval by the members of Cheah Kongsi to enter into the agreement with the respondent as recorded in the minutes of the EGM and GM held prior to the execution of the agreement. With those resolutions already in place and, in any event, with the obtaining of the subsequent court order of 31 October 2005, which endorsed the entry into the agreement itself, it was not open for Cheah Kongsi to now say that the sanction-condition for the performance of the contract, had not been duly satisfied (see para 48).

(2) The surrender of the title deed to Lot 429 for 'subdivision' for the specific purpose of excising land to be set aside as road reserve for a widened back lane, did not involve any 'transfer' of land to the respondent as provided under cl 103 of the agreement. The learned trial judge was not in error when His Lordship was dismissive of the materiality or relevance of the actual wording as found in the court order already in hand, at this stage (see para 52).

(3) The conclusion of the learned trial judge that there had been a breach of contract committed by Cheah Kongsi when they refused to hand over the title deed to Lot 429 was a finding of fact supported by the evidence placed before the court. The obligations contractually incumbent upon Cheah Kongsi had to be considered particularly in the context of cl 12.05 of the agreement. Cheah Kongsi could not avoid their obligation to hand over the title deed to Lot 429 when requested for by the respondent and/or directed by the land authorities (see para 53).

(4) With respect to the second phase, it was not in dispute that no plans had been prepared by the respondent or submitted as yet for approval to the relevant authorities. The respondent's claim framed as 'loss of forseeable loss of profit from development opportunity of Phase 2' was therefore too remote and did not arise directly from the breach of contract (the non-surrendering of the title deed to Lot 429) by Cheah Kongsi (see paras 70 & 72).

(5) With regard to the first phase, expenses had already incurred by the respondent and also anticipated gain from that part of the development project, fell within losses reasonably contemplated under the breached

agreement; they were not remote or indirect and therefore was recoverable subject to proper and sufficient proof of such loss or expenses. Only proof of the sum of RM842,352 incurred or spent by the respondent towards progressing the first phase's development was properly adduced before the court by the respondent, thus, this amount had to be allowed (see paras 75–76).

(6) There ought to be a proper process of assessment of the respondent's claim for damages under the head of claim categorised on 'loss of profit/gain at completion of Phase 1'. Parties ought to be given an opportunity to fully address this issue of the proper quantum of damages to be awarded, including whether there ought to be any adjustment for 'mitigation' and if so, how it ought to be determined (see para 80).

[Bahasa Malaysia summary

Perayu dalam kes ini adalah pemegang amanah dan pemegang jawatan utama sebuah pertubuhan berdaftar dikenali sebagai Cheah Kongsi manakala responden adalah syarikat pemaju hartanah. responden dan Cheah Kongsi telah memasuki satu perjanjian ('perjanjian') untuk membangunkan tanah dimiliki oleh Cheah Kongsi sebagai Lot 429 dan 430 bersama dengan lima bidang tanah bersebelahan dimiliki oleh pihak lain ('projek pembangunan'). Pada 31 October 2005, Mahkamah Tinggi melalui satu permohonan dibuat oleh Cheah Kongsi telah meluluskan dan telah mengisbat perjanjian. Projek pembangunan akan dijalankan dalam dua fasa, di mana fasa pertama akan melibatkan Lot 429 dan dua lot lain manakala fasa kedua akan melibatkan Lot 430 dan tiga lot lain oleh pemilik lain-lain. Pertikaian berbangkit apabila Cheah Kongsi enggan untuk menyerahkan dokumen hakmilik Lot 429 kepada responden atau pihak berkuasa tanah untuk mengeksais jalan rizab yang dilebarkan untuk lorong belakang setelah kelulusan pelan untuk 'subdivision' oleh pihak berkuasa tanah. Seterusnya, responden menyaman perayu untuk pelanggaran kontrak dan menuntut untuk ganti rugi untuk dibayar kepada Cheah Kongsi. Hakim perbicaraan membenarkan tuntutan responden, walau bagaimanapun Yang Arif memutuskan untuk mengurangkan tuntutan responden untuk ganti rugi dan hanya membenarkan 25% daripada tuntutan responden untuk fasa pertama dan 14% daripada tuntutan responden untuk fasa kedua. Tidak berpuas hati dengan keputusan, perayu merayu terhadap keputusan tersebut manakala responden membuat rayuan balas terhadap award ganti rugi diberikan olah hakim perbicaraan. Isu-isu yang luas untuk dibincangkan di mahkamah adalah: (a) dapatan hakim perbicaraan terhadap kesahan dan penguatkuasaan perjanjian; (b) pada dapatan Yang Arif bahawa terdapat pelanggaran kontrak dilakukan dengan kegagalan Cheah Kongsi untuk menyerahkan surat ikatan hakmilik Lot 429 apabila diperlukan; dan (c) pada taksiran dan award gantirugi dibuat oleh hakim bijaksana.

Diputuskan, membenarkan sebahagian rayuan perayu dan menolak rayuan balas responden:

(1) Terdapat keterangan yang cukup akan perbincangan berkaitan dan disebabkan kelulusan oleh ahli Cheah Kongsi untuk masuk ke dalam perjanjian dengan responden seperti yang direkodkan dalan minit EGM dan GM yang diadakan sebelum pelaksanaan perjanjian. Dengan resolusi yang telah sedia ada dan, dalam apa-apa keadaan, dengan perolehan perintah mahkamah yang berikutnya pada 31 Oktober 2005, yang mana mengendors kemasukan dalam perjanjian itu sendiri, ia tidak terbuka untuk Cheah Kongsi untuk sekarang menyatakan bahawa syarat isbat untuk pelaksanaan kontrak itu, tidak dipenuhi dengan sewajarnya (lihat perenggan 48).

(2) Penyerahan surat hakmilik kepada Lot 429 untuk 'subdivision' untuk tujuan tertentu untuk mengeksais tanah untuk diketepikan kerana jalan rizab untuk melebarkan lorong belakang, tidak melibatkan apa-apa 'transfer' terhadap tanah kepada responden seperti mana yang dipertuntukkan di bawah klausa 103 perjanjian. Hakim yang bijaksana tidak terkhilaf apabila Yang Arif menyangkal perkara material atau keberkaitan perkataan sebenar seperti yang didapati dalam perintah mahkamah yang telah pun di dalam tangan, pada peringkat ini (lihat perenggan 52).

(3) Kesimpulan hakim yang bijaksana bahawa terdapat pelanggaran kontrak dilakukan oleh Cheah Kongsi apabila mereka enggan untuk menyerahkan surat ikatan hakmilik Lot 429 adalah satu dapatan fakta yang disokong oleh keterangan yang dikemukakan di hadapan mahkamah. Kewajipan kontraktual bertanggungan atas Cheah Kongsi perlu dipertimbangkan terutamanya dalam konteks klausa 12.05 perjanjian. Cheah Kongsi tidak boleh mengelak kewajipan mereka untuk menyerahkan surat ikatan hakmilik Lot 429 apabila diminta oleh responden dan/atau diarahkan oleh pihak berkuasa tanah (lihat perenggan 53).

(4) Berkaitan dengan fasa kedua, ia tidak dipertikaikan bahawa tiada pelan telah disediakan oleh responden atau dikemukakan lagi untuk kelulusan pihak berkuasa berkaitan. Tuntutan responden dirangka sebagai 'loss of forseable of profit from development opportunity of Phase 2' oleh itu adalah amat tidak berkaitan dan tidak timbul secara langsung daripada pelanggaran kontrak (tiada penyerahan surat ikatan hakmilik Lot 429) oleh Cheah Kongsi (lihat perenggan 70 & 72).

(5) Berkenaan fasa pertama, perbelanjaan telah pun ditanggung oleh responden dan juga keuntungan yang dijangkakan daripada bahagian projek pembangunan, terangkum dalam kerugian munasabah yang dipertimbangkan di bawah pelanggaran perjanjian; ia adalah berkaitan

dan bukan secara langsung dan oleh itu adalah boleh diperolehi semula tertakluk kepada bukti kerugian atau perbelanjaan sebegitu yang wajar dan mencukupi. Hanya bukti jumlah RM842,352 ditanggung atau dibelanjakan oleh responden ke arah perkembangan pembangunan fasa pertama adalah dikemukakan dengan wajar di hadapan mahkamah oleh responden, maka, jumlah ini hendaklah dibenarkan (lihat perenggan 75–76).

(6) Sepatutnya ada proses penaksiran yang wajar terhadap tuntutan responden untuk kerugian di bawah tuntutan dikategorikan sebagai 'loss of profit/gain at completion of Phase 1'. Pihak-pihak sepatutnya diberikan peluang untuk menangani isu kuantum ganti rugi ini untuk diawardkan, termasuk sama ada sepatutnya terdapat apa-apa pembetulan untuk 'mitigation' dan jika ya, bagaimana ia sepatutnya ditentukan (lihat perenggan 80).]

Notes

For a case on documents of title, see 8(3) *Mallal's Digest* (5th Ed, 2015) para 3587.

For cases on breach of building contract, see 3(3) *Mallal's Digest* (5th Ed, 2015) paras 3880–3918.

Legislation referred to

Contracts Act 1950 s 74(1), (2)

Appeal from: Suit No 22–734 of 2008 (High Court, Pulau Pinang)

Kann Lim Ai Ching (Suppiah a/l Arumugam and Lee Kar Kheng with him) (Presgrave & Matthews) for the appellant.

Tan Beng Hng (Yiew Voon Jin and Lau Teng Kheng) (Goh Eng Kee & Co) for the respondent.

Varghese George JCA:

[1] The appeal and cross-appeal before us arose from a High Court decision, which after full trial, had ordered a registered society (of which the first and second appellants/defendants were trustees and principal office bearers) to pay a sum of RM3,575,537 (together with interest and costs) to the respondent/plaintiff for breach of a contract for the development of land belonging to the registered society.

[2] The registered society will be referred to as 'Cheah Kongsi' and the respondent/plaintiff as 'the plaintiff' in this grounds of decision.

A BACKGROUND FACTS

[3] Cheah Kongsi was the registered owner of two pieces of land known as Lot No 429 and Lot No 430 held under Grant Nos 37227 and 37228 respectively in Sek 23 Georgetown, North East District, Penang.

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[4] The plaintiff was a property developer company.

[5] Following prior preliminary negotiations, the plaintiff on 5 March 1999 had entered into an agreement with Cheah Kongsi ('the agreement') to develop Lot 429 and Lot 430 together with five adjoining pieces of land belonging to other parties by erecting thereon offices, shops and other related commercial buildings for mixed purposes ('the development project'). The plaintiff had paid Cheah Kongsi the agreed security deposit of RM50,000 under the terms of the agreement.

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[6] The plaintiff had prior to that entered into similar development agreements on 4 November 1996 and on 29 December 1997 respectively with the two registered owners of the other adjoining lots, namely Lot Nos 425, 426, 428 and Holding No 427, and for Lot No 273, to jointly develop all the lots together with Cheah Kongsi's lots of land for the purposes aforesaid (the registered owners of the other lots are referred to herein collectively as 'Khoo Kongsi').

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[7] Immediately after the agreement had been entered into, the plaintiff through their consultants had taken steps to obtain planning approval from the relevant authorities. The Majlis Perbandaran Pulau Pinang ('MPPP') had on 4 June 1999 duly acknowledged the first submission for planning approval received from the plaintiff.

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[8] On 26 May 2003, the plaintiff was given a power of attorney (registered as PA15658/03 at Penang High Court) to enable the plaintiff to pursue with the authorities, in the name of Cheah Kongsi, all necessary action to obtain development approvals and also to take action to evict ground tenants and squatters on Cheah Kongsi's land.

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[9] On 31 October 2005, the High Court in Penang, in an application made by Cheah Kongsi vide OS No 24–1354 of 2003, had also approved and sanctioned the agreement that had been entered into by Cheah Kongsi with the plaintiff.

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[10] The plaintiff had by 8 January 2007 cleared all the ground tenants and squatters on Lot 429 and 430; this assertion was not denied specifically by Cheah Kongsi in their statement of defence.

[11] Between 2000 and 2008, the plaintiff paid all the quit rent and assessment dues in respect of Cheah Kongsi's Lots 429 and 430.

[12] The proposed development on lands owned by Cheah Kongsi and Khoo Kongsi were planned to be undertaken in two phases. The first phase involved Block A and Block B to be erected on Lot 429 (Cheah Kongsi), Lots 425 and 273 (Khoo Kongsi). The second phase development was to encompass the land in Lot 430 (Cheah Kongsi) and other lots including Lots 426, 428 and 427 (Khoo Kongsi).

[13] The relevant planning approval for the Phase 1 development was obtained by plaintiff's consultants architect from MPPP on 18 October 2006 (and this was extended on 15 November 2007 and 12 November 2008) as per Plan No BP42770 and the other detailed drawings produced in court.

[14] In the letter from MPPP of 18 October 2006 approving Pelan Pembangunan No 42770 it was stated as follows:

> ... Majlis di mesyuarat yang telah diadakan pada 18hb Oktober 2006 telah bersetuju meluluskan permohonan tertakluk kepada syarat-syarat berikut:
>
> > *1. Permohonan pecah sempadan bagi tujuan penyerahan tanah dengan milikan kosong untuk pelebaran jalan dan lorong belakang* hendaklah diluluskan Majlis dan dikemukakan kepada Pihak Berkuasa Negeri *sebelum kerja pembinaan dimulakan dan* diluluskan oleh Pihak Berkuasa Negeri sebelum Sijil Kelayakan Menduduki dikeluarkan.
>
> ...
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> ...
>
> (Emphasis added.)

(A similar 'syarat' was included in the subsequent extensions as well).

[15] On 19 October 2007, the Pengarah Tanah dan Galian notified that the application for 'Pecah Sempadan' (involving Lots 429, 273 and 425) had been approved. The related application had been previously made on 3 August 2006 by the plaintiff's land surveyor.

[16] On 27 December 2007, solicitors for plaintiff wrote to Cheah Kongsi informing them that the plans for 'subdivision' had been approved by the land authority and requested for the original title document for Lot 429 to be forwarded to the plaintiff's solicitors with the undertaking to return the new

title deed to Cheah Kongsi upon receipt of the same by the land surveyor. A reminder thereto was also sent on 10 March 2008.

[17] At the request of Cheah Kongsi, the plaintiff's consultant ('the architect') attended a trustee's meeting on 25 May 2008 and briefed them as to the progress to date in matters related to the intended development of the lands and why it was necessary to surrender the title document to Lot 429 *for excising the widened road reserve for the back lane, before construction works could commence*. The architect (PW3 subsequently at the trial) also had assured them at this meeting that the replacement title document to be issued by the authorities would still remain in the name of Cheah Kongsi.

[18] On 22 July 2008 the Pentadbir Tanah Daerah Timur Laut issued the statutory Borang 2B notice to the trustees of Cheah Kongsi to surrender the document of title to Lot 429 in the hands of Cheah Kongsi '... untuk tujuan pembatalan disebabkan hakmilik berterusan darinya telah didaftarkan dan dokumen keluaran ini siap untuk diambil'.

[19] Cheah Kongsi ignored the request/notice and refused to surrender the title document to the solicitors for the plaintiff or to the land authorities.

[20] On 9 August 2008 however, solicitors for Cheah Kongsi (GT Khoo & Association) wrote to the plaintiff seeking proof as to the veracity of what was stated in preamble 2.0 of the agreement, namely, as regards the statement there that the plaintiff was the owner of the other Lot Nos 425, 426 and 428.

[21] On 15 September 2008, solicitors for the plaintiff wrote to Cheah Kongsi's solicitors and the material parts of that letter are reproduced here:

> Our clients are surprised that your clients are now asking for documentary proof that our clients are the registered proprietors of properties described in Recital 2.0 of the Joint Venture Agreement dated 5th March, 1999. *It is well within your clients knowledge at the time of the signing of the Agreement that our clients are not the registered proprietors of those properties and that in the circumstances Recital 2 with reference to our clients' proprietorships is evidently an error on the part of your clients' own solicitors who were instructed by your clients to draw up the Agreement.* Your clients thereof cannot take advantage of their own error to repudiate the Agreement. The problem now is your clients' unwillingness actuated by bad faith to perform the Agreement.
>
> We are instructed that since 5th March, 1999 our clients have diligently kept your clients fully informed of the progress made by them under the Agreement. Your clients were required by notice in Form 2B issued by Pejabat Tanah Daerah on 22nd July, 2008 to deliver up Geran (First Grade) No 37227 for the purpose of sub-division pursuant to the Joint Venture Agreement of 5th March 1999. Instead of responding immediately, your clients have completely ignored the said notice and have by their act evinced an intention to repudiate the agreement.

> We are hereby instructed to give you notice that our clients are affirming the said Agreement and to require your clients to comply with the notice in Form 2B forthwith albeit the time limited therein has expired. Take further notice that unless we hear from your clients within seven (7) days from the date hereof our instructions are to commence proceeding for specific performance and in that event will hold your clients liable for damage in addition to specific performance, cost and interest.

[22] Cheah Kongsi then on 29 September 2008 attempted to have a meeting directly with the plaintiff but solicitors for the plaintiff responded that the title document to Lot 429 had to be surrendered first before any further discussion between them could take place. Cheah Kongsi failed to do so.

[23] This suit was then filed on 11 December 2008 by the plaintiff alleging breach of contract and claiming for damages to be paid by Cheah Kongsi.

[24] In contrast to Cheah Kongsi's refusal, Khoo Kongsi on the other hand had surrendered the title documents to Lots 273 and 425 as requested, and they were issued the titles in continuation in October 2009 by the land authorities.

THE PLAINTIFF'S CASE

[25] The plaintiff's contention in essence was that Cheah Kongsi in refusing to hand over the title deed to Lot 429, required for 'subdivision' by the land authorities, had evinced an intention to repudiate the agreement. The plaintiff had not accepted the repudiation but had chosen to affirm the contract.

[26] The resultant breach of the contract by Cheah Kongsi,it was alleged, had occasioned loss and damages to the plaintiff, including development expenditure already incurred, and still continuing, and also loss of foreseeable profit/gain that would have accrued to the plaintiff if both Phase 1 and Phase 2 of the development project was duly completed.

[27] The plaintiff's claim was for a total amount of RM25,586,165, the breakdown of which was set out in the re-amended statement of claim.

CHEAH KONGSI'S DEFENCE

[28] Cheah Kongsi's defence was two pronged. *Firstly*, it was contended that their trustees who had entered into the agreement had no authority to do so since it was without the approval of 2/3 members at a general meeting. Further, on this issue of the validity and enforceability of the agreement, it was also pleaded that the condition to obtain the approval of the court had not been

obtained and/or that the court order of 31 October 2005 was not in the terms envisaged under cl 1.03 of the agreement, and accordingly that specific condition precedent was, in any event, not satisfied for any contract to have come into existence or to be enforceable.

[29] The *second* thrust of the defence was that, notwithstanding the refusal to surrender the title document to Lot 429, the plaintiff could in any event have proceeded with the development project as per the terms of the agreement, since all necessary approvals from MPPP for construction to begin had been obtained. In other words, it was contended that the contract did not become impossible of performance merely by the failure to hand over the title document to Lot 429 by Cheah Kongsi. This, it was argued, was merely an excuse for the plaintiff not commencing or proceeding with the development/construction works.

[30] It was also contended for Cheah Kongsi that per cl 10.6 of the agreement, the 'transfer' of the land was only envisaged at the completion of the development and it was unreasonable of the plaintiff to require the 'surrender' of the title document to Lot 429 even before any construction work had commenced.

THE HIGH COURT

[31] Having meticulously analysed the documentary evidence and oral testimonies led before the court, the learned trial judge held that the entry into the agreement by Cheah Kongsi by the then trustees had been duly authorised and even approved by EGMs of its members held on 14 August 1999, 21 January 1996 and 21 July 1996. The court order of 31 October 2005 obtained by Cheah Kongsi (based on the EGM resolution of 14 August 1996) had also sanctioned and approved the agreement. Further Cheah Kongsi themselves had always acquiesced and treated the agreement as valid and in force until the request for the title deed for Lot 429 to be surrendered to the land authorities was made by the plaintiff's solicitors in December 2007.

[32] It was not denied that Cheah Kongsi was paid and had accepted the security deposit, had even granted a power of attorney to the plaintiff to act further in pursuance of the agreement. Cheah Kongsi also stood to benefit from the plaintiff successfully having the land in question cleared of squatters and ground tenants in the meanwhile, all towards meeting the objective of the agreed development by the plaintiff of Cheah Kongsi's land, together with the other lands of Khoo Kongsi.

[33] The court also held that there had been no misrepresentation, albeit 'fraudulent', as alleged by Cheah Kongsi, in the description of the plaintiff as

'owner' of the land belonging to Khoo Kongsi (in the preamble to the agreement), since Cheah Kongsi was aware all along who in fact owned the adjoining land being developed together with Cheah Kongsi's land; it was plainly a mistake and even Cheah Kongsi's solicitors had advised that this 'misdescription' as such was not sufficient to resile from the agreement.

[34] Relying on the contents of various minutes, subsequently produced on the direction of the court by Cheah Kongsi ('Bundle I'), the learned trial judge held that Cheah Kongsi themselves had acknowledged that the title deed to be replaced (after 'subdivision') would still be in their name and accordingly there was no issue of Cheah Kongsi's interest in Lot 429 being 'transferred' at that stage.

[35] According to the learned trial judge, the real reason for Cheah Kongsi's refusal to hand over the title deed to Lot 429 was that they were hoping to 're-negotiate for better terms and conditions' as clearly borne out by the recorded observation made by a trustee found in the minutes of ninth extraordinary trustees meeting held on 17 October 2008.

[36] It was the learned trial judge's conclusion that the '... recalcitrant and unreasonable behaviour of the trustees of Cheah Kongsi in refusing to hand over the titles when they knew that it was for subdivision and not for transfer, was the sole cause for the failure of the project'.

[37] Turning then to the issue of damages to be ordered for the breach of contract by Cheah Kongsi, whilst acknowledging that the plaintiff was entitled to 'losses that are foreseeable and not remote' (rightfully, in our view), the learned trial judge held that Cheah Kongsi ought to have known that if the agreement was scuttled, the plaintiff would suffer all those losses which flow as a result of the whole development project being aborted.

[38] The learned trial judge went on to hold that by the failure of the development project, the plaintiff had been prevented from receiving its 'return of investment which ought to have (been) generated from the project'. Accordingly the court further held that the plaintiff was entitled to damages or to be compensated for losses including anticipated profits from both the Phase 1 and Phase 2 of the planned development project.

[39] The learned trial judge then went on to hold that the plaintiff had in any event an obligation to mitigate their losses, and there was no evidence that this had been done in the calculations presented to the court by PW7. In respect of Phase 1 the court consequently only allowed the plaintiff 25% of their claim and in respect of Phase 2, only 14% of the claim was allowed. These sums were derived by the court after deductions for mitigation were made to the plaintiff's

claims, based, as it would seem, on a proportionate basis using the relative areas/sizes of Lot 429 on the one hand and Lot 430 on the other hand, as against the respective sizes of all the other lands involved, firstly in Phase 1 and then in Phase 2 (Lot 430 only featured in planned Phase 2 development).

THE APPEAL

[40] As we made out from the written and oral submissions of counsel for Cheah Kongsi, the thrust of their contentions in appeal were that:

(a) the agreement was a conditional contract subject to sanction of the 2/3 majority of the members of Cheah Kongsi in a general meeting, and in the absence of such a sanction, the agreement was 'ultra vires' the constitution of Cheah Kongsi and therefore unenforceable;

(b) the learned trial judge had failed to give due weight and consideration to contemporaneous documents and also the testimonies of the plaintiff's own witnesses who had admitted that the non-surrender of the title deed (Lot 429) did not prevent actual commencement of development (meaning construction) works;

(c) the reliance by the learned trial judge on the contents of documents introduced in Bundle I halfway during the trial, took the case outside the plaintiff's pleaded case, and further the observation by the learned trial judge that Cheah Kongsi's motive in refusing to surrender the title deed was to secure a better bargain and terms, was unwarranted and prejudicial to Cheah Kongsi;

(d) the learned trial judge had descended into the realm of surmise, speculation and conjecture in ordering the damages as was done in this case, that was even after the learned trial judge had expressed reservations on the basis and/or calculations of the same produced for the plaintiff; and

(e) as regards the damages awarded with reference to Phase 2, which was also considered to have been aborted as well, the learned trial judge omitted to consider that no preparatory work or any plans had been to date submitted with regard to the envisaged Phase 2 of the development project at all.

[41] The plaintiff's counsel, on the other hand, argued that clearly on the material placed before the court, the learned trial judge was justified in coming to his conclusion as His Lordship did on the issue of Cheah Kongsi's liability for breach of the agreement. This was a finding of fact. There was an obligation on Cheah Kongsi to hand over the title deed as this was a *syarat* to be complied with before the project could take-off. Cheah Kongsi knew fully well the consequences that would follow by their failure to do so.

[42] It was contended that the plaintiff had acted reasonably when it stopped all further work under the planned works for both Phase 1 and Phase 2 and accepted Cheah Kongsi's refusal as a repudiation of the contract.

[43] With regard to Bundle I (which contained some critical minutes referred to by the learned trial judge), it was pointed out that the bundle of documents was produced by Cheah Kongsi themselves, albeit, at the direction/order of the court during the course of the trial. In any event, as noted by the learned trial judge in the grounds of decision itself, counsel for Cheah Kongsi was given an opportunity before the conclusion of the trial to indicate whether he had any reservation or wished to qualify the same; counsel for Cheah Kongsi had affirmed that they had no such qualification to it being referred by the court.

[44] As regard the damages ordered in favour of the plaintiff, which also formed the subject matter of the plaintiff's cross-appeal, it was argued for the plaintiff that:

(a) the proposed development in Phase 2 was an inseparable and integrated part of the development within the scope of the agreement and the learned trial judge was correct in treating the same accordingly; and

(b) the learned trial judge was however wrong in making the deductions supposedly for 'mitigation' to the amounts claimed and presented by the plaintiff through PW7 and supported by credible evidence and calculations; Cheah Kongsi on the other hand had not adduced any evidence to show what part of the overall project could be saved or reconfigured, if at all.

[45] Further matters raised in the submissions of the respective parties are adverted to in our deliberation below.

OUR DELIBERATION AND DECISION

[46] There were three broad areas of controversy that required our deliberation and decision in this appeal. They were:

(a) the findings of the learned trial judge as to the validity and enforceability of the agreement;

(b) the findings of the learned trial judge that there had been a breach of contract committed by Cheah Kongsi's failure to hand over the title deed to Lot 429 when required; and

(c) the assessment and award damages made by the learned trial judge.

[47] As regards the *validity and/or enforceability of the agreement*, we have to

point out that before us Cheah Kongsi was no longer pursuing their pleaded defence that the trustees who had entered into the agreement with the plaintiff had not been duly authorised to do so. The only grounds being canvassed, was that the agreement was a conditional contract, namely that its performance was subject to the securing of firstly, a 2/3 approval of Cheah Kongsi's members at a general meeting, and secondly, that the sanction of the court as to the 'transfer' of Cheah Kongsi's land had not been properly obtained.

[48] On the first of the aforesaid condition argued by Cheah Kongsi to have not been complied with, we were of the view that there was, as noted by the learned trial judge, sufficient evidence of related discussion and due approval by the members of Cheah Kongsi to enter into this contract with the plaintiff, (to be involved in the development project together with other adjoining landowner) as recorded in the minutes of the EGM and GM held prior to the execution of the agreement. We agreed with the learned trial judge that with those resolutions already in place and, in any event, with the obtaining of the subsequent court order of 31 October 2005, which *endorsed the entry into the agreement itself* (obtained at the instance of Cheah Kongsi themselves), it was not open for Cheah Kongsi to now say that the sanction-condition for the performance of the contract, had not been duly satisfied.

[49] We also agreed with the learned trial judge that the misdescription of the ownership of the other lands involved in the development project (as belonging to the plaintiff rather than to Khoo Kongsi) in the preamble to the agreement was purely a mistake and not of any consequence to the effectiveness or enforceability of the agreement. It was undeniable that with the prior execution of similar development agreements with the other land owners, the plaintiff, at the time of the signing of the agreement, had already been vested with sufficient 'interest' in the other lands as the party contracted by the land owners in question to undertake the overall development project; the agreement itself, as noted earlier, had been drawn up by Cheah Kongsi's own solicitors.

[50] We were also of the view that the learned trial judge did not commit any error or misdirect himself when His Lordship referred to passages from the various minutes and documents which had been introduced by Cheah Kongsi, although this was done after the trial was underway. Firstly, it was always obligatory upon Cheah Kongsi to have disclosed and made available for inspection of the other party all documents in their possession and control which had relevance to the issues at hand in the suit, even if the contents thereof were adverse to Cheah Kongsi. This had not been done and it was only upon the prodding of the learned trial judge during the course of trial that these crucial documents were subsequently introduced in court through solicitors for Cheah Kongsi.

[51] More significantly, in our view however was the fact that counsel for Cheah Kongsi had no qualification or reservation of the documents being used when the opportunity to do so was accorded to Cheah Kongsi by the court. Cheah Kongsi also did not choose to apply and reopen their case to offer any explanation as to the contents of those documents through any witness. In all the circumstances surrounding the matter, the learned trial judge was not wrong to proceed on the basis that the authenticity and contents of those documents in Bundle I were not in dispute and the contents therein all supported the fact that the agreement had always been affirmed as being valid and binding on Cheah Kongsi. Cheah Kongsi was fully cognisant of all actions that had been taken by the plaintiff towards the performance of the terms of the agreement subsequent to its execution on 5 March 1999.

[52] It was true that cl 1.03 of the agreement envisaged a court order for the sanctioning of the 'transfer' of Cheah Kongsi's land to the plaintiff. However, the surrender of the title deed to Lot 429 for 'subdivision' for the specific purpose of excising land to be set aside as road reserve for a widened back lane, did not involve any 'transfer' of land to the plaintiff (or to any subsequent purchasers of the completed units) at that stage. It had been made clear to Cheah Kongsi and its trustees that the title deed in continuation to be issued after such 'subdivision' formalities were completed by the land authorities would still be in the name of Cheah Kongsi. There was no evidence to the contrary adduced by Cheah Kongsi. In that sense, the learned trial judge was not, in our view, in error when His Lordship was dismissive of the materiality or relevance of the actual wording as found in the court order already in hand, at this stage.

[53] With respect to the conclusion of the learned trial judge that there had been *a breach of contract* committed by Cheah Kongsi when they refused to hand over the title deed to Lot 429, we were of the view that this was a finding of fact supported by the evidence placed before the court. The obligations contractually incumbent upon Cheah Kongsi had to be considered particularly in the context of cl 12.05 of the agreement which required Cheah Kongsi, inter alia, to '… execute, acknowledge or deliver or will cause or permit to be done, executed, acknowledged and delivered all such further acts, deed, assignments, transfers, conveyances and assurances as may be reasonably required by the other party in order to carry out fully and effectively the transactions herein contemplated in accordance with the provisions of this agreement'. Cheah Kongsi could not avoid their obligation to hand over the title deed to Lot 429 when requested for by the plaintiff and/or directed by the land authorities.

[54] There obviously was some confusion as it would appear amongst counsel, as well as the witnesses, as to the various steps involved in the approval process of plans and drawings for a proposed development, in contrast to the

commencement of actual construction works itself. The authority for granting planning approval was the local authority, here the MPPP. They would only give the go ahead to commence actual construction works after requisite approvals from various related bodies and departments, often with conditions attached, were obtained and complied with by the contractor/developer, usually by needful amendments to the submitted plans. This was clearly stated in MPPP's letter of 18 October 2006 quoted at para 14 above.

[55] It would also be noted that Plan No BP 42770 had exhibited thereon the various approvals of the other departments or bodies (apart from MPPP), whose interest in the proposed development was not only to ensure orderly, safe construction methods but also for the building(s) to be ultimately constructed was in accordance with proper and specified building standards and planning requirements. In that sense those departments and bodies had a stake in the development with reference to their duty to the public. It was also usual that in the approval process there would be requirements made of the landowner to surrender some part within the land area being planned for development, for purposes of additional roads, substations and such like.

[56] The Pejabat Tanah Daerah, the land authority was an important party in this process. In this subject appeal, what was at the centre of the controversy was the requirement that there ought to be a surrender of some portion of the land area comprised in Lot 429 (Cheah Kongsi's land) and Lots 273 and 425 (Khoo Kongsi's land) *for the widening of an existing back lane* running through the three lots as evident from the relevant plans; the separate buildings planned to be erected were Block A and Block B on the two parts of the total land area that was separated by that back lane.

[57] The first *syarat* ('condition') of the planning approval issued in principle by MPPP to the plaintiff (and repeated in the extensions) as mentioned earlier, required the approval and due compliance by the plaintiff with the conditions as laid out by the land authorities. The objective behind this first hurdle, as was obvious to us, was to determine with finality the actual land area/boundaries of the land available *before* the construction of the two buildings (Block A, Block B in the Phase 1) could commence according to the approved plans. It was in this specific context that one ought to view why Cheah Kongsi was under an obligation to surrender the title document to Lot 429 to be substituted with a title in continuation, for an area *minus* the area required for the widening of the back lane.

[58] It was pointed out to us that various witnesses for the plaintiff had upon being cross-examined admitted that with the letter from MPPP, construction could nevertheless be commenced by the plaintiff, that is as submitted, without the title document being even surrendered for such excising of the widened

back lane. In our evaluation, although *ex-facie* on a simple reading of those letters of approval it did state to the effect that 'the plans had been approved for commencement of construction' *but* there was still outstanding this one primary condition related to demarcation of the available land area and its actual boundaries, which had to be first complied with before physical construction works could commence on site.

[59] We therefore could not agree with submissions of counsel for Cheah Kongsi that the learned trial judge had not taken into consideration the so called 'admission' of the plaintiff's witnesses at the trial or that the court's conclusion was therefore perverse on that count. The learned trial judge was very correct to say the subdivision was '... not a fiction of the plaintiff's imagination but was an essential pre-requisite imposed by MPPP'. We should also make a note here, that in our assessment, the surrender and replacement of the title documents in question, termed as for 'subdivision', was in effect and for all intents and purposes for excising land from the three lots of land to provide for a widened back lane, and not for 'subdivision' per se into parcels or for separate strata titles to be issued.

[60] As regards the observation of the learned trial judge drawn from material within Bundle I, specifically the discussions of the trustees at their meeting of 17 October 2008, that the underlying reason for Cheah Kongsi's refusal to surrender the title deed to Lot 429 was to obtain a better bargain and/or to seek more favourable terms for the deal from the plaintiff, it was our view that the learned trial judge was perfectly entitled to reach that inference as to the real motive in Cheah Kongsi's refusal to hand over the title deed. There was sufficient material in Cheah Kongsi's own records to ground that conclusion.

[61] It need to be stressed that Cheah Kongsi had acquiesced and allowed the plaintiff to proceed with the various steps required to carry out the development agreed to by Cheah Kongsi pursuant to the terms of the agreement. The plaintiff had submitted and subsequently obtained planning approval (subject to conditions), proceeded to even clear the squatters and ground tenants on the land in question, and further had responsibility for and paid all quit rents and assessment during the period 2000–2008 due on Cheah Kongsi's land.

[62] It was indeed telling that only now (when the title deed to Lot 429 was being requested to be handed over for excision of land required for widening of the back lane), that is, after some eight years had elapsed and much expenses extended in furtherance of the overall development project by the plaintiff, that Cheah Kongsi was attempting to challenge the existence of their contractual obligation and/or the binding terms of the agreement.

[63] It was obvious that Cheah Kongsi was desperately trying to maintain an untenable position late in the day by raising some 'technical' issues, as it transpired. The learned trial judge's observation as to Cheah Kongsi's underlying motives was backed by what was contained in the minutes of trustees meeting. It was not misplaced nor was it a misdirection which warranted reversal of the decision that there was firstly, an enforceable contract in existence with Cheah Kongsi, and secondly that this contract had been breached by Cheah Kongsi.

[64] We were therefore not persuaded that we should disturb the learned trial judge's finding and conclusion on the evidence that there had been a breach of contract committed by Cheah Kongsi when they chose not to hand over the document of title to Lot 429 for the attention of the land authorities. Their refusal was unjustified especially since there was an undertaking that the to be issued title in continuation would still bear Cheah Kongsi's name as the owner of the land. There was no transfer entailed here which could have been construed to be adverse to the Cheah Kongsi's continued registered interest in Lot 429.

[65] As regards, *the award of damages* ordered by learned trial judge, we however had some misgivings. The learned trial judge recognised that the losses recoverable by the plaintiff should be reasonable, not remote and such claims should '... fall within the ambit of the horizon of forseeability'.

[66] In our assessment, there were two main issues that arose for our consideration from the award of damages made by the learned trial judge. Firstly, there was the question whether the learned trial judge was entitled to consider and include the losses that allegedly would follow from an abandonment of Phase 2 development as a composite part of the damages awarded to the plaintiff. Secondly, whether in respect of Phase 1 itself, whether the court was correct to award 'loss of profit' for Phase 1 relying on the calculations and projections presented by PW7 without further proof and assessment, especially when the learned trial judge on his own initiative had factored in a deduction for 'mitigation' as the court did here in this case.

[67] The following observations of the learned trial judge in the grounds of judgment were of particular significance in this regard:

(a) '146. And so, at least in respect of Phase 1 of the project, the plaintiff should be compensated for all the losses, it has suffered by way of loss of opportunity to realise its return of investment from Phase 1 ...';

(b) '148. For Phase 1, the figures have been calculated somewhat accurately from an arithmetic standpoint but the basis of the calculations is not easily comprehensible. To my mind Phase 1, is one stage of the development and Phase 2 is another stage involving different parcels of land.';

(c) '149. However, the figures set out in the statement of claim ... and supporting particular ... seem to have conflated (to) two Phases of the development project. In this regard I had difficulty in trying to extricate the figures from the documents that have been presented to the court.'; and

(d) '147. It is not in dispute that Phase 2 has not taken off and there was no concept plan, drawing or any approval whatsoever for Phase 2 ...'.

The above excerpts from the grounds itself indicate that the learned trial judge had harboured some doubts while evaluating the damages to be awarded.

[68] After having given careful consideration to what would amount to fair and reasonable damages recoverable by the plaintiff in the particular context and circumstances surrounding this suit, we were of the following view:

(a) the plaintiff was not entitled to any compensation with respect to any likely 'abandonment of the proposed Phase 2' of the development project as claimed and accordingly, the plaintiff's claim for 'loss of forseeable loss of profit from development opportunity of Phase 2' as presented should not have been allowed; and

(b) with reference to Phase 1:

(i) judgment ought only have been entered for the plaintiff for the sum of RM842,352 which had been proved as development related expenditure already incurred and borne by the plaintiff; and

(ii) although the plaintiff was entitled to recover damages for 'loss of profit/gain at completion of Phase 1' on the evidence, the quantum to be awarded had to be properly assessed by the learned *timbalan pendaftar* of the court, with due regard being given to the plaintiff's obligation in law to mitigate such losses allegedly suffered, consequent to the breach of contract by Cheah Kongsi.

[69] Section 74(1) and (2) of the Contracts Act 1950 which principally set out the law in respect of compensation recoverable upon a breach of contract are reproduced here:

74(1) When a contract has been broken, the party who suffers by the breach is entitled to receive, from the party who has broken the contract, *compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from the breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.*

(2) *Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.*

(3) ...

[70] With respect to Phase 2, it was not in dispute that no plans had been prepared by the plaintiff or submitted as yet for approval to the relevant authorities. Lot 430 of Cheah Kongsi's land was to be involved in this Phase 2 of the development project together with the lands comprised in several other lots of land belonging to Khoo Kongsi.

[71] More than 15 years had elapsed since Khoo Kongsi and/or Cheah Kongsi had entered into respective agreements for the building development on those lots of land earmarked for Phase 2 of the development project. There were no plans or drawings produced by the plaintiff to show that the owners of the respective lots of land had even approved the concept of the nature of the building development to be undertaken in this proposed Phase 2 of the development project. It will be recalled that in respect of Phase 1 there were Plans duly signed by all concerned land owners and they included detailed Plans as to the buildings to be erected; approvals in principle for Phase 1 to proceed had been secured thereto from the planning authority, MPPP. Phase 2 development had not reached anywhere near the stage that Phase 1 development had progressed to. Realisation towards what was envisaged as Phase 2 development was definitely a long way off.

[72] In our view, the plaintiff's claim framed as 'loss of forseeable loss of profit from development opportunity of Phase 2' was therefore too remote and did not arise directly from the breach of contract (the non-surrendering of the title deed to Lot 429) by Cheah Kongsi. Whether Phase 2 would take-off and be completed still depended very much on many variables and stages in the planning approval process that had yet to be attended to, much less even initiated presently, by the plaintiff.

[73] There was no material before the court to justify any award of damages to compensate the plaintiff in respect of the proposed Phase 2 of the development project. The learned trial judge himself had alluded to some doubts about this as highlighted by us above in paras 146 and 147 of the grounds of judgment.

[74] Further in our assessment it was not wholly accurate to describe the overall development project as 'composite' or 'an integrated one'. Clearly the evidence showed that there were two stages in the envisaged development of the lands belonging to Cheah Kongsi and Khoo Kongsi. *Phase 1 between Lebuh Pantai and Lebuh Victoria* only involved Lot 429 (Cheah Kongsi) and Lot 425 and Lot 273 (Khoo Kongsi) (see Plan No BP42770). The other stage of development (Phase 2) involving Lot 430 (Cheah Kongsi) and the other lots were on the south-eastern side of Lebuh Victoria, and this was not at all contiguous to the lands involved in the Phase 1 development.

[75] With respect to Phase 1 however, we were of the view expenses already incurred by the plaintiff and also anticipated gain from that part of the development project, fell within losses reasonably contemplated under the breached agreement; they were not remote or indirect and therefore was recoverable subject to proper and sufficient proof of such loss or expenses. A

B

[76] Only proof of the sum of RM842,352 incurred or spent by the plaintiff towards progressing the Phase 1 development was properly adduced before the court by the plaintiff. This amount had to be therefore allowed.

C

[77] In respect of the rest of the plaintiff's claim related to Phase 1, namely for 'loss of profit/gain at completion of Phase 1', some evidence and calculations was, no doubt, adduced by the plaintiff through PW7. PW7 evidence was not seriously challenged by Cheah Kongsi and was accepted by the learned trial judge. Cheah Kongsi themselves did not call any evidence on this count to contradict PW7's calculations on the 'loss of profit/gain' likely to be caused to the plaintiff. D

[78] What was however disturbing to us was the fact that the learned trial judge then went on to hold that the plaintiff's alleged computed losses must be reduced to 'reflect' of 'represent' the plaintiff's obligation in law to mitigate their loss or likely loss. The learned trial judge chose to apportion the value to be attributed to 'mitigation' by reference to the size of Lot 429 in comparison to Lot 273 and Lot 425 (combined) in the Phase 1 development. Accordingly, the learned trial judge made a deduction of 75% to the calculations and allowed only 25% of the plaintiff's loss as presented by PW7. E F

[79] In our view, the plaintiff no doubt had an obligation to mitigate their losses or by evidence demonstrate that Phase 1 development could not be saved or modified without involving Lot 429 belonging to Cheah Kongsi. No such evidence was forthcoming either from the plaintiff or Cheah Kongsi. What confounded the issue further, and what we considered to be unsatisfactory was, the very premise upon which the learned trial judge on his own imposed a 'formula' to represent 'mitigation' and for the alleged losses to be deducted accordingly by reference to the relative sizes of the lands involved in Phase 1. There was definitely some element of speculation and conjecture, as submitted by Cheah Kongsi, in adopting such a formula to determine the final award of damages made here. G H

[80] We were therefore of the view that there ought to be a proper process of assessment of the plaintiff's claim for damages under the head of claim categorised on 'loss of profit/gain at completion of Phase 1'. Parties ought to be given an opportunity to fully address this issue of the proper quantum of damages to be awarded, including whether there ought to be any adjustment I

for 'mitigation' and if so, how it ought to be determined. Another issue that had to be given consideration too was the actual extent of the investment or financial commitment/outlay involved on the part of the plaintiff in respect of the Phase 1 development up to point of the breach of the agreement by Cheah Kongsi. It was trite that the damages to be recoverable by the plaintiff should always be reasonable and not result in 'unjust enrichment' of the plaintiff.

[81] In summary, it was our unanimous conclusion that:

(a) the learned trial judge was not in error in the finding that Cheah Kongsi had breached the agreement by their refusal to hand over the title document for Lot 429;

(b) the plaintiff was not entitled to any loss or damage as claimed in respect of the proposed Phase 2 development;

(c) the plaintiff was only entitled to enter judgment for the sum of RM842,352 being the proved expenditure incurred by the plaintiff in respect of Phase 1 development; and

(d) the quantum of damages to be awarded on account of the plaintiff claim for 'loss of profit/gain at completion of Phase 1' be remitted to the *Timbalan Pendaftar,* High Court for proper assessment with the due regard, being given, inter alia, to the issue of 'mitigation' of damage, obligatory upon the plaintiff.

[82] Accordingly, the appeal was allowed in part only. The crossappeal was dismissed.

[83] In the circumstances, we ordered each party to bear their own costs.

Appellant's appeal allowed in part; respondent's cross-appeal dismissed.

Reported by Dzulqarnain Ab Fatar